Supreme Court, U.S.
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No. 91-2082

In The

Supreme Court of the United States

October Term, 1992

NATHAN A. RICE, BOBBY R. WATSON and BOB SEYMOUR,

Petitioners,

v.

JAMES CALVIN MITCHELL,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Respondent James Calvin Mitchell respectfully submits that a writ of certiorari to review the opinion of the United States Court of Appeals for the Fourth Circuit in *Mitchell v. Rice*, 954 F.2d 187 (4th Cir. 1992), is unnecessary and should not issue.

STATEMENT OF THE CASE AND FACTS

Petitioners devote most of their Statement of the Case to a summary of Respondent's poor disciplinary record.

Their purpose is to obscure the nature of the punishment meted out by the Petitioners to obtain an "improvement" of Respondent's behavior. Petitioners' response to these discipline problems was to confine Respondent to his cell, on a twenty-hour per day basis, for two extended periods of time. The first such confinement was for seven months. The second was for thirteen months. Respondent was permitted to leave his cell only to shower twice each week, and then in full chain restraints. He had no opportunity for any out-of-cell exercise or recreation during this nearly two year period.

It was this deprivation which forms the basis for Respondent's Eighth Amendment claim. The Petitioners contended that they were entitled to qualified immunity on Respondent's claim because it was not clearly established that such confinement was unconstitutional. The District Court and the Fourth Circuit rejected this argument.

REASONS FOR DENYING CERTIORARI

I. THE FOURTH CIRCUIT APPLIED A TRADITIONAL QUALIFIED IMMUNITY ANALYSIS WHICH DOES NOT WARRANT REVIEW BY THIS COURT.

The Petitioners see demons where there are none. Their application for certiorari is based upon the assertion that the Fourth Circuit's opinion has "in effect eliminate[d] qualified immunity." Pet. at 11. That is hardly the case. This strained interpretation is based on the Fourth Circuit's passing reference, in a footnote, to this Court's

recent opinion in *Wilson v. Seiter*, 111 S.Ct. 2321 (1991). *Mitchell v. Rice*, 954 F.2d 187, 193 n.6 (4th Cir. 1992). The Court of Appeals referred to *Wilson* to underscore that it was not ruling on the merits of Respondent's claim, but that it was limiting its decision to whether the right that Petitioners violated was clearly delineated for qualified immunity purposes. *Wilson* was cited for its admonition that there must be an inquiry into the state of mind of the actors accused of the constitutional violation before an Eighth Amendment violation can be found.

The Petitioners have a very different view of the Fourth Circuit's footnote. They interpret it as creating an "alternative theory of liability" for prisoners to raise which Petitioners say will effectively bypass the qualified immunity defense. Their position appears to be that the Fourth Circuit's holding means that since an Eighth Amendment claimant must establish a culpable state of mind, that culpability will always be a question of fact and summary judgment will never be appropriate.

It is the Petitioners, and not the Fourth Circuit, who have blurred the distinction between qualified immunity and the questions of fact surrounding any resolution on the merits. The only question at this stage, under *Anderson v. Creighton*, 483 U.S. 635 (1987), was whether "[t]he contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. The issue under *Anderson* is not whether the Defendant's conduct was unconstitutional. The Court engaged in a thorough review of its precedent regarding a prisoner's right to out-of-cell exercise opportunities, and properly concluded that this right was sufficiently clear that it could

not grant summary judgment on Petitioners' claims of qualified immunity.

The immunity accorded prison officials is only a qualified one. Petitioners may wish for more, but the objective test of *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982), was properly applied here, and the Petitioners could not establish their entitlement to qualified immunity. This was their burden. *See, e.g., Dellums v. Powell*, 566 F.2d 167, 176 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); *Skehan v. Board of Trustees*, 538 F.2d 53, 61 (3d Cir.), *cert. denied*, 429 U.S. 979 (1976). Cf. *Clark v. Link*, 855 F.2d 156, 160-61 (4th Cir. 1988) (burden "appears" to rest on claimant). Petitioners' claim that the Fourth Circuit "grafted" the subjective standard of *Wilson* onto the objective standard of *Harlow*, and that the Court gave the Respondent a "sword" meant to be only a "shield", is based upon a misreading of the holding of the Court. It was true to the principles of *Harlow*. But, if indeed the Fourth Circuit inquired into the subjective motivation in making its ruling, that was appropriate. As virtually every Court of Appeals has recognized, it is often impossible to keep *Harlow* entirely on its objective underpinnings. *See, e.g., Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 648 (10th Cir. 1988) (where subjective intent is an underlying element of the tort, *Harlow* did not exclude an inquiry into the intent of the defendants); *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1432 (D.C. Cir. 1987) (rejecting defendants' claim that, under *Harlow*, state of mind was never relevant, referring to this as "a fault or vulnerability in the current law of qualified immunity."); *Kenyatta v. Moore*, 744 F.2d 1179, 1185 (5th Cir. 1984) (Supreme Court has "not

entirely eliminate[d] subjective inquiry from every qualified immunity analysis."), *cert. denied*, 471 U.S. 1066 (1985).

To the extent that Petitioners suggest that the *Mitchell* decision is in conflict with the Ninth Circuit's decision in *McKinney v. Anderson*, 959 F.2d 853 (9th Cir. 1992), they are wrong. There was no qualified immunity issue raised in *McKinney*. The holding of that case ultimately stands for the same proposition as the footnote in *Mitchell* – that a prisoner making an Eighth Amendment claim must, at some stage, establish the state of mind of the person violating his rights. *Id.* at 854. This is an inquiry separate from that of qualified immunity, and one to be made after the qualified immunity issue is resolved. That is the issue which should now be addressed by the district court, and which is not now before this Court.

II. THIS IS NOT A CASE WHERE *TURNER v. SAFLEY* SHOULD HAVE BEEN APPLIED.

There are North Carolina prison regulations that set out the steps prison officials must take before depriving an inmate of out-of-cell exercise opportunities. Petitioners now claim that since they acted pursuant to regulation, it is the regulation itself, not their conduct, which is at issue. They contend that the Court should have applied the four-prong test of *Turner v. Safley*, 482 U.S. 78, 89-90 (1987). *The Supreme Court has never applied Turner to an Eighth Amendment case. See Jordon v. Gardner*, 953 F.2d 1137 (9th Cir. 1992) (applying *Turner* to First Amendment claim but not Fourth Amendment or Eight Amendment

claims). As Judge (now Justice) Kennedy wrote in *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979):

> it must . . . be remembered that enforcement of the eighth amendment is not always consistent with allowing complete deference to all administrative determinations by prison officials. Whatever rights one may lose at the prison gates, the full protections of the eighth amendment most certainly remain in force. The whole point of the amendment is to protect persons convicted of crimes. Eighth amendment protections are not forfeited by one's prior acts. Mechanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary.

Id. at 193-94 (citations omitted).

The North Carolina prison regulations in question provide that inmates in maximum custody are entitled to outside exercise at least twice a week. N.C. Admin. Code tit.5 r.2C.0303(3)(b) (Oct. 1991). The regulations explicitly provide that if it is necessary to restrict out-of-cell activity because of an inmate's assaultive behavior, the prisoner shall be allowed to exercise in security restraints. *Id.* at r.2C.0303(4). If further restriction is necessary, the inmate shall be "advised of specific alternate exercise programs." *Id.* at r.2C.0303(4)(e). And if such drastic restrictions are imposed, they are to be reviewed at 30-day intervals. *Id.* at r.2C.0303(4)(f). *There is no evidence in the record that Mitchell was ever advised of alternate exercise*

programs or that his severe punishment was reviewed at the appropriate times.[1]

In its present posture, this case is not about those regulations. There are genuine issues of material fact whether Petitioners complied with them. The issues raised at this stage concern the Respondent's conditions of confinement and whether they violated a "clearly established right" for qualified immunity purposes.

If Petitioners wish to raise the defense that they acted pursuant to prison regulations or to put into play the constitutionality of those regulations, they are entitled to do that in the appropriate forum. Respondent has not contended that these regulations are unconstitutional. All that is before this Court is the issue of qualified immunity.

III. THE RIGHT TO OUT-OF-CELL EXERCISE OF AT LEAST SOME MINIMAL DEGREE WAS SUFFICIENTLY WELL ESTABLISHED.

Petitioners' final argument is that Mitchell's right to out of cell recreation was not sufficiently clear at the time for them to anticipate that their complete deprivation of

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[1] Federal prison regulations protect exercise privileges with equal care. Inmates are specifically guaranteed the right to exercise. 28 C.F.R. § 541.12. (1991) Prison disciplinary committees may revoke exercise privileges, but oniy for a specified period of time. *Id.* at § 541.13. Such a withdrawal may not exceed a period of one week. *Id.* at § 541.22(6). Inmates in a "control unit program" (those who have injured or threatened others) are guaranteed "a minimum of seven hours weekly recreation and exercise out of the cell." *Id.* at § 541.46(e)(1).

this right might entitle him to damages. If this were so, Petitioners would have been entitled to qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987).

The Fourth Circuit properly held, however, that this right was sufficiently clear. The federal courts have long emphasized the importance of allowing even the most dangerous prisoners some brief relief from their cells to exercise and recreate. *See, e.g., Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979). The law in the Fourth Circuit counselled strongly against complete deprivations of exercise opportunities. *See, e.g., Clay v. Miller*, 626 F.2d 345, 346 (4th Cir. 1980) ("[I]n certain circumstances, restricting inmates' opportunities for physical exercise constitutes cruel and unusual punishment in violation of the Eighth Amendment."); *Kirby v. Blackledge*, 530 F.2d 583, 587 (4th Cir. 1976) ("Many of the circumstances taken alone reach the level of cruel and unusual punishment, such as . . . inadequate exercise . . . . "); *Sweet v. South Carolina Department of Corrections*, 529 F.2d 854, 866 (4th Cir. 1975) (*en banc*) ("[I]ndefinite limitation on exercise may be harmful to a prisoner's health, and, if so, would amount to 'cruel and unusual' punishment.").

The Petitioners were on notice that they were treading in an area of constitutional significance. If the issue in this case had been whether a set period of exercise, of a set frequency, was constitutionally permissible, perhaps qualified immunity would be appropriate. Here, however, there was no exercise at all allowed. No court has ever held that the total deprivation of exercise for such long periods of time is constitutionally permissible.

Qualified immunity therefore was not appropriate here. There is no reason for the Supreme Court to disturb this aspect of the Court of Appeals' ruling.

CONCLUSION

This case presents none of the "special and important" reasons justifying a grant of a writ of certiorari. Respondent respectfully requests that the Petition be denied.

Respectfully submitted this the 24th day of July 1992.

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